

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED
MAY 29 1922
F. D. MONCKTON,
CLERK.

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

JOHN L. SLATTERY, Esq., U. S. Attorney, Helena,
Montana,

W. H. MEIGS, Asst. U. S. Attorney, Helena, Mon-
tana,

Attorneys for Libelant and Defendant in
Error.

Messrs. GRIMSTAD & BROWN, of Billings, Mon-
tana,

Attorneys for Intervenor and Plaintiff in
Error.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, Tools and Acces-
sories, and A. J. STUPER,

Libelees,

and

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Intervenor.

BE IT REMEMBERED, that on August 1st, 1921,
a Libel of Information was duly filed herein, being
in the words and figures following, to wit: [1*]

*Page-number appearing at foot of page of original certified Transcript
of Record.

In the District Court of the United States, District
of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 41½
Goodrich Silvertown Cord Tire on Right
Front Wheel, One 34 x 41½ Goodyear Tire on
Right Rear Wheel, One 34 x 41½ Goodyear
Tire on Left Front Wheel, One 34 x 41½
Goodyear Tire on Left Rear Wheel, One
34 x 41½ Goodyear Tire on Side of Car, One
Bumper in Front, One Short Handle Shovel,
One Full Set Side Curtains, One Auto Jack,
One Tire Pump, One Demountable Rim
Wrench, Three Small Monkey Wrenches,
Three Hammers, Two Pairs Pliers, Four End
Wrenches, One Storage Battery, One Spot-
light, One 34 x 41½ Innertube, One Set 34 x
41½ Chains, and A. J. STUPER,

Libelees.

Libel of Information.

BE IT REMEMBERED, that W. H. Meigs, As-
sistant United States Attorney in and for the Dis-
trict of Montana, who, for the United States, in its
behalf prosecutes, comes here in person into the
District Court of the United States for the District
of Montana, and informs the Court and gives it to
understand:

That the United States of America hereby brings

suit against that certain conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and one 34 x 4½ Goodrich Silvertown cord tire on right front wheel, one 34 x 4½ Goodyear tire on right rear wheel, one 34 x 4½ Goodyear tire on left front wheel, one 34 x 4½ Goodyear tire on left rear wheel, one 34 x 4½ Goodyear tire on side of car, one bumper in front, one short handle shovel, one full set side curtains, one auto jack, one tire pump, one demountable rim wrench, three small monkey wrenches, three hammers, two pairs pliers, four end wrenches, one [2] storage battery, one spotlight, one 34 x 4½ inner tube, one set 34 x 4½ chains, hereinafter mentioned as tools and accessories, which said automobile and tools and accessories are now in the hands of H. M. Dengler, an officer of the United States, and a Deputy Collector of Internal Revenue in the State and District of Montana, having been seized by John MacLeod, Sheriff of Big Horn County, in the said State and District of Montana, and which said conveyance and said tools and accessories, the said John MacLeod did on the 31st day of January, 1921, seize and secure as liable to seizure and forfeiture under the provisions of the Internal Revenue laws of the United States, said conveyance being then and there used in the removal of goods and commodities, to wit, distilled spirits, in respect whereof a tax is imposed by law, with intent to defraud the United States of such tax.

That the Assistant United States Attorney alleges

and particularly propounds as grounds and cause for said forfeiture;

1. On or about the 31st day of January, 1921, near the City of Hardin, in the County of Big Horn, in the State and District of Montana, A. J. Stuper did then and there wrongfully and unlawfully remove, and was concerned in removing, by means of One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, a quantity of distilled spirits, to wit, whiskey, the exact quantity of which is to the libelant unknown, the same being then and there goods for and in respect whereof a tax was then imposed by law, to wit, the Internal Revenue Tax then imposed by law on distilled spirits, he, the said A. J. Stuper then and there intending to defraud the said United States of said tax on the said distilled spirits, so removed as last aforesaid;

2. That A. J. Stuper claims some right, title or interest in and to the said conveyance, to wit, one Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, used in [3] the removal of the said distilled spirits, and which contained said distilled spirits, and in said tools and accessories, and in said goods and commodities, to wit, whiskey, the exact quantity of which is to the libelant unknown;

3. That said conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, was seized on the 31st day of January, 1921, as liable to seizure and forfeiture under the provisions of the Internal Revenue

Laws of the United States, by John MacLeod, Sheriff of Big Horn County, in said State and District of Montana, for the reason that the said conveyance had been, and then was being, used in the unlawful removal of distilled spirits aforesaid;

4. That said conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and said tools and accessories, are now subject to seizure;

WHEREFORE, the said Assistant United States Attorney for the District of Montana, who prosecutes as aforesaid for the United States, prays that due process of law may be awarded in this behalf, to enforce the forfeiture of the said conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and said tools and accessories, so seized as aforesaid, and to give notice to all persons concerned to appear on the return date of said process, to show cause, if any they have, why said forfeiture should not be adjudged.

W. H. MEIGS,

Assistant United States Attorney, District of Montana. [4]

United States of America,
District of Montana,—ss.

W. H. Meigs, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he knows the con-

tents thereof, and that the same is true to the best of his knowledge, information and belief.

W. H. MEIGS.

Subscribed and sworn to before me this 1st day of August, 1921.

[Seal]

C. R. GARLOW,
Clerk U. S. District Court, District of Montana.
Filed August 1, 1921. C. R. Garlow, Clerk.

That thereafter, on August 1st, 1921, order for process and publication was duly filed herein, being in the words and figures following, to wit: [5]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4½
Goodrich Silvertown Cord Tire on Right
Front Wheel, One 34 x 4½ Goodyear Tire on
Right Rear Wheel, One 34 x 4½ Goodyear
Tire on Left Front Wheel, One 34 x 4½
Goodyear Tire on Left Rear Wheel, One
34 x 4½ Goodyear Tire on Side of Car, One
Bumper in Front, One Short Handle Shovel,
One Full Set Side Curtains, One Auto Jack,
One Tire Pump, One Demountable Rim
Wrench, Three Small Monkey Wrenches,
Three Hammers, Two Pairs Pliers, Four End

Wrenches, One Storage Battery, One Spotlight, One 34 x 41½ Innertube, One Set 34 x 41½ Chains, and A. J. STUPER,

Libelees.

Order for Process and Publication.

A libel of information having been filed in the above-entitled court in the above-entitled cause, on the 1st day of August, 1921, and being fully advised of the law and the facts, and it appearing therefrom to be a proper case therefor, now therefore,

IT IS ORDERED, and THIS DOES ORDER:

I.

That said libel of information is hereby set for trial and hearing before the above-entitled court at the courtroom thereof in the City of Great Falls, in the State and District of Montana, on the 1st day of September, 1921, at the hour of ten o'clock in the forenoon of said day.

II.

That process in due form of law issue against the property [6] described in said libel of information to enforce a forfeiture of said property.

III.

That notice of the time and place of trial and hearing on said libel of information be given to all persons interested in said property, by causing the substance of said libel, with the order of the Court setting the time and place appointed for said trial, and hearing to be published in "The Tribune," a newspaper of general circulation published at Hardin, in the State and District of Montana, and near the place where said property was seized, and by post-

ing the same in three public places in the City of Great Falls, in the State and District of Montana, for the period of fourteen (14) days prior to the time set for said trial.

Dated this 1st day of August, 1921.

BOURQUIN,
Judge.

Filed August 1, 1921. C. R. Garlow, Clerk.

Thereafter, on August 30, 1921, motion for leave to intervene and intervenor's petition was duly filed herein, being in the words and figures following, to wit: [7]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 41½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 41½ Goodyear Tire on Right Rear Wheel, One 34 x 41½ Goodyear Tire on Left Front Wheel, One 34 x 41½ Goodyear Tire on Left Rear Wheel, One 34 x 41½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches,

Three Hammers, Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34 x 41½ Innertube, One Set 34 x 41½ Chains, and A. J. STUPER,

Libelees,

and

E. P. McDOWELL, Doing Business Under the Firm Name Land Style of E. P. McDOWELL MOTOR COMPANY,

Intervenor.

Motion for Leave to Intervene.

Comes now E. P. McDowell and moves the Court for leave to intervene as party defendant in the above-entitled action, and represents to the Court as follows, to wit:

I.

That E. P. McDowell is now, and was at all times hereinafter mentioned doing business under the firm name and style of E. P. McDowell Motor Company, and is now and was at all the times hereinafter mentioned engaged in the business of selling automobiles, with his place of business at Billings, Montana. [8]

II.

That on or about the 1st day of August, 1921, a libel of information was filed in the above-entitled court against a certain conveyance, to wit: One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and one 34 x 41½ Goodrich Silvertown Cord tire on right front

wheel, one 34 x 41½ Goodyear tire on right rear wheel, one 34 x 41½ Goodyear tire on left front wheel, one 34 x 41½ Goodyear tire on left rear wheel, one 34 x 41½ Goodyear tire on side of car, one bumper in front, one short handle shovel, one full set side curtains, one auto jack, one tire pump, one demountable rim wrench, three small monkey wrenches three hammers, two pairs pliers, four end wrenches, one storage battery, one spotlight, one 34 x 41½ inner tube, one set 34 x 41½ chains, all of which will be hereinafter designated and mentioned as tools and accessories, which automobile, tools and accessories are now in the hands of H. M. Dengler, an officer of the United States and a deputy collector of internal revenue in the State and District of Montana, all of which are more fully set forth in the libel of information, to which reference is hereby made.

III.

That E. P. McDowell, doing business as E. P. McDowell Motor Company, is now and was at all times hereinafter mentioned the holder of the legal title to said automobile, tools and accessories, as hereinafter more fully set forth, to wit:

(a) That on December 3, 1920, at Billings, Montana, said intervenor sold to A. J. Stuper, mentioned in the libel of information, the automobile, tools and accessories hereinbefore mentioned, and that on said date he took from said A. J. Stuper a conditional sales contract for the unpaid balance thereof, which at that time [9] was Fourteen Hundred

Eight Dollars (\$1408.00), a copy of which conditional bill of sale is hereto attached, marked Exhibit "A," and made a part of this plea of intervention; that subsequent to the signing and execution of said conditional bill of sale and prior to the time it was seized, as set forth in the libel of information, your intervenor caused the same to be filed for record in the office of the County Clerk and Recorder of Deeds for Yellowstone County, Montana, where the same is of record, and has ever since been of record; that said conditional bill of sale has been in force ever since its execution, and that there is now due and owing from A. J. Stuper to the intervenor the sum of Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, and that no part of said sum of Fourteen Hundred Eight Dollars (\$1408.00), or interest thereon has been paid to the intervenor by A. J. Stuper, or anyone else acting for him, and that there is now due and owing said intervenor said sum and interest, and that the same is a valid enforceable claim.

IV.

That at the time said sale was made to A. J. Stuper by the intervenor, as hereinbefore set forth, the intervenor had no knowledge or information that said automobile, tools and accessories were to be used to convey distilled liquors, and that the intervenor has not been at any time, or is he now acting in collusion with the said A. J. Stuper, or any of the other libelees.

V.

That said intervenor further represents and states as a fact that said automobile, tools and accessories were not being used by said A. J. Stuper, on or about the 31st day of January, 1921, or at [10] all, for the purpose of removing distilled spirits with intent to defraud the United States of America of any revenue tax, or at all, and in this behalf he alleges that said automobile, tools and accessories are not liable to forfeiture and seizure under the provisions of the Internal Revenue Law of the United States of America, or at all, and further alleges that said automobile, tools and accessories was not at any time, or at all, seized by any officer of the United States of America, but that the same was taken from A. J. Stuper by the Sheriff of Big Horn County, Montana, and that he was not at that time, or at all, and particularly at the time of the alleged seizure, to wit: January 31, 1921, an officer of the United States of America authorized to seize the same.

VI.

Intervenor further denies that said automobile, tools and accessories mentioned in said libel of information are subject to forfeiture and seizure, and denies, generally, each and every allegation contained in said libel of information.

Said E. P. McDowell further represents to the Court:

I.

That said libel of information is insufficient on the face thereof to constitute a valid claim against

said automobile, tools and accessories mentioned there in for the reason that it shows upon the face of the same that said automobile, tools and accessories were seized by virtue of the provisions of the Internal Revenue Laws of the United States of America, and that said laws have been repealed by the law designated and known as the National Prohibition Act, or the Volstead Act, and that said seizure and forfeiture is therefore void, illegal and of no force and effect. [11]

II.

That said A. J. Stuper, who it is alleged was in possession of said automobile, tools and accessories on the 31st day of January, 1921, when it was seized, as set forth in said libel of information, has never been convicted of the crime of transporting and removing said distilled spirits with intent to defraud the United States of America from any tax imposed by law thereon, as set forth in said libel.

WHEREFORE, said E. P. McDowell, doing business under the name of E. P. McDowell Motor Company, prays as follows, to wit:

(1) That his claim of Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, be allowed as a valid and existing claim against said automobile, tools and accessories, and that he be paid said sum out of any proceeds derived from the sale of said automobile, tools and accessories, and that said claim be a prior one over and above any claim of the United States of America.

(2) That said libel of information be dismissed.

(3) That the court make and enter herein an order permitting said E. P. McDowell to intervene in said cause, and that this plea of intervention be the plea of said E. P. McDowell.

(4) For such other and further relief, general or special, legal or equitable, as he may be entitled to.

E. P. McDOWELL,

Intervenor.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

His Attorney. [12]

State of Montana,

County of Yellowstone,—ss.

E. P. McDowell, being first duly sworn, deposes and says:

That he is the intervenor hereinbefore mentioned, and that he has read the above and foregoing petition for intervention and knows the contents thereof, and that the matters and things therein contained are true.

E. P. McDOWELL.

Subscribed and sworn to before me this 29th day of August, 1921.

[Seal]

O. KING GRIMSTAD,

Notary Public for the State of Montana, Residing
at Billings, Montana.

My commission expires Jan. 12, 1923. [13]

Exhibit "A."

NOTE AND CONDITIONAL BILL OF SALE.

\$1408.00

Billings, Montana, Dec. 3, 1920. No. —

For value received, I, we or either of us, jointly and severally promise to pay to the order of E. P. McDowell Motor Company, at its office in the City of Billings, Montana, the sum of Fourteen hundred and eight and no/100 Dollars (\$1408.00), as follows: one hundred seventy-six dollars on the fourth day of each and every month for eight months, with interest thereon at the rate of 10 per cent per annum, payable monthly from date until paid, with all costs of collection and reasonable attorney fees in case payment is not made at maturity. The makers and endorsers hereby waive presentment, demand, protest and notice thereof. The consideration of this obligation is that the said E. P. McDowell Motor Company has delivered and agreed to sell to the undersigned the following personal property, to wit: Hudson speedster 11-0-32512, motor 91473.

Provided, however, that the title and ownership of the said property shall be and remain in the said E. P. McDowell Motor Company until full payment is made of the amount set forth and upon such payment being made the undersigned shall be the owner of said property.

In the event of failure to pay this note, or any payments or interest thereon when due, or if the said property is not properly cared for, or if it is

seized or levied upon or sold or removed, or if any attempt is made to sell or remove it from the County of Yellowstone, State of Montana, without the written consent of said [14] Company, the said Company, its agents, successors or assigns, may take immediately, by an action in claim and delivery, as provided by law, recover the possession of said property wheresoever located, or the sheriff of the county where said property may be located, when so authorized by the said E. P. McDowell Motor Company, its agents, successors or assigns, may take possession of the said property and sell the same after notice given therefor, for such time and in the manner provided by law for sheriff's sale of personal property under execution, and apply the proceeds thereof.

First: To the payment of the expenses of such sale, including attorneys' fees; and

Second: to the amount due on the foregoing note and the remainder, if any, shall be paid to the vendee.

Said taking and sale shall not relieve the undersigned from paying the balance due on this note, should a deficiency arise after said sale, and the said Company, may, at its option, retain said property and all payments made on this note, in satisfaction thereof, and all sums which have been made shall be and remain the property of the said company, the same being considered as the reasonable rental value of said property.

A. J. STUPER.

Postoffice Miles North,
County Miles East,
Sec.....Township....Range.... Miles South,
Witness to signature:Miles West,
E. P. McDOWELL Of Billings.
Filed August 30, 1921. C. R. Garlow, Clerk. [15]

Thereafter, on January 26, 1922, leave to intervene was granted herein, the minute entry thereon being as follows, to wit:

In the District Court of the United States, in and
for the District of Montana.

No. 938.

UNITED STATES

vs.

ONE HUDSON AUTO and A. J. STUPER.

Order Granting Leave to Intervene.

Comes now W. H. Meigs, Esq., Assistant U. S. Attorney, and states to the Court that the plaintiff herein consents to the petition of E. P. McDowell to intervene herein as to the automobile involved, whereupon Court ordered that said petition to intervene be filed, the case not to be set for trial at present.

Entered in open court January 26, 1922.

C. R. GARLOW,
Clerk.

Thereafter, on March 9, 1922, a stipulation and agreed statement of facts was duly filed herein, being in the words and figures following, to wit: [16]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34x41½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34x41½ Goodyear Tire on Right Rear Wheel, One 34x41½ Goodyear Tire on Left Front Wheel, One 34x41½ Goodyear Tire on Left Rear Wheel, One 34x41½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34x41½ Innertube, One Set 34x41½ Chains, and A. J. STUPER,

Libelees,

and

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

Intervenor.

Stipulation and Agreed Statement of Facts.

It is hereby stipulated and agreed by and between John L. Slattery, Esq., United States District Attorney for the District of Montana, for and on behalf of the United States of America, in the above-entitled matter, and Messrs. Grimstad & Brown, for and on behalf of the claim of E. P. McDowell in the above-entitled matter, that the following facts are hereby admitted as true and are hereby submitted to the Court for Judgment thereon:

I.

That A. J. Stuper did on the 31st day of January, 1921, near the City of Hardin, County of Big Horn, State and District of Montana, have possession of One Hudson Automobile, License [17] No. 57695 Montana 1920, Engine No. 91473, Car No. 32512, together with the tools and accessories described in the information on file herein, and that at that time the said A. J. Stuper had a quantity of distilled spirits, to wit, whiskey, in said automobile and that he was transporting, removing, and concerned in removing the same, by means of said Hudson Automobile, tools and accessories, as mentioned in said libel of information, without first obtaining a permit entitling him so to do, and paying the Internal Revenue tax due thereon; the said whiskey then and there so transported and removed being distilled spirits in respect whereof a tax then was imposed by law, to wit, the Internal Revenue tax imposed by law on distilled spirits, and then

and there due and unpaid; that said Hudson Automobile and tools and accessories were taken by the plaintiff, by and through its proper officers, and that they are now in the possession of plaintiff, its officers and agents.

II.

That at the time said automobile, tools, and accessories, as mentioned in said libel of information, were taken into the possession of the United States of America that E. P. McDowell, the intervenor herein, had a valid and existing claim against said automobile, tools and accessories in the sum of fourteen hundred eight dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, and that said claim of the said E. P. McDowell was represented by a conditional bill of sale, he having sold said automobile, tools and accessories to the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time of the seizure thereof; that said conditional bill of sale was signed and executed by the said A. J. Stuper and was *bona fide* in all respects, and was placed on record in the office of the [18] County Clerk and Recorder of Deeds for Yellowstone County, Montana, on the 7th day of December, 1920, which is the County where said E. P. McDowell is doing business and where said automobile, tools and accessories were sold; that said sale was in all respects fair and legal and was not made with any knowledge or information of any kind whatsoever on the part of the said E. P. McDowell that the said A. J. Stuper

intended to, or had any intentions of any kind to use the same to transport distilled spirits in violation of the laws of the United States of America.

III.

That said automobile, tools and accessories were taken from A. J. Stuper, at the time and manner mentioned in said libel of information, by John Macleod, who was at that time Sheriff of Big Horn County, Montana, and that he was not at that time, or at all, an officer of the United States of America, but at said time was acting in his capacity as a Sheriff of Big Horn County, Montana.

IV.

That the whiskey so being removed and transported in said Hudson Automobile, at the time said Hudson Automobile, tools and accessories were seized, was Canadian whiskey, then and there and theretofore imported into the United States and upon which the Internal Revenue tax therefor had not been paid.

V.

That after said automobile, tools and accessories were seized by the said Sheriff of Big Horn County, Montana, it was at a subsequent date thereof duly turned over to the officers of the United States of America, together with the [19] distilled spirits found in said automobile.

VI.

That the libel of information as filed herein is prosecuted by reason of the violation of the Internal Revenue Laws of the United States of America, and not by reason of any violation of the National

Prohibition Act, which is commonly known as the Volstead Act.

VII.

That the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time they were seized, has never been convicted of the crime of transporting and removing distilled spirits with intent to defraud the United States of America from any tax imposed by law thereon, or at all.

VIII.

That a true and correct copy of said conditional sales contract is attached to the answer of E. P. McDowell filed in said cause, and that said sum, to wit: Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at ten per cent annum from December 3, 1920, was due and owing the said E. P. McDowell from the said A. J. Stuper at the time said automobile, tools and accessories were taken from the said A. J. Stuper, as set forth in said libel of information, and that said sum and interest is now due the said E. P. McDowell, and has not been paid, and that the same would be a valid lien against said automobile, tools, and accessories, if the same were sought to be forfeited under the laws of the State of Montana, and that the said E. P. McDowell has no other means of collecting or enforcing said claim.

Signed and dated this 3d day of March, 1922.

JOHN L. SLATTERY,

United States Attorney, District of Montana.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

Attorneys for E. P. McDowell, Intervenor.

Filed March 9, 1922. C. R. Garlow, Clerk. [20]

Thereafter, on March 10, 1922, said cause came on regularly for trial, the minute entry thereof being as follows, to wit:

In the District Court of the United States in and for the District of Montana.

No. 938.

UNITED STATES

vs.

ONE HUDSON AUTO and A. J. STUPER.

Trial.

This cause came on regularly for trial this day, John L. Slattery, Esq., U. S. District Attorney, appearing for the United States, and O. King Grimstad, Esq., appearing for the intervenor. Thereupon the cause was submitted to the Court upon the agreed statement of facts filed herein. Thereupon counsel for the intervenor moved the court for a verdict in favor of said intervenor upon the ground that section 3450 R. S. U. S. has been repealed by the National Prohibition Act, upon which the cause was submitted to the court. Thereupon,

after due consideration, court ordered that decree be entered herein in favor of the United States as pray for, to which ruling of the Court the intervenor then and there excepted and exception noted.

Thereupon counsel for the intervenor gave oral notice of appeal and the court fixed the cost bond on appeal in the sum of Three Hundred Dollars.

Entered in open Court March 10, 1922.

C. R. GARLOW,
Clerk.

Thereafter, on March 13, 1922, decree was duly filed and entered herein, being in the words and figures following, to wit: [21]

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 41½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34x41½ Goodyear Tire on Right Rear Wheel, One 34x41½ Goodyear Tire on Left Front Wheel, One 34 x 41½ Goodyear Tire on Left Rear Wheel, One 34 x 41½ Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers,

Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34 x 41½ Innertube, One Set 34 x 41½ Chains, and A. J. STUPER,

Libelees,

and

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

Intervenor.

Decree.

This cause having come on regularly for trial before the Court, without a jury, John L. Slattery, Esq., United States Attorney, appearing as counsel for the United States of America, the libelant, and O. King Grimstad, Esq., appearing as counsel for libelees and intervenor, and an agreed statement of facts dated March 3, 1922, and signed by the above named counsel respectively, having been duly filed herein, which agreed statement is ordered to be made a part of the record in this cause;

And thereupon, neither party desiring to introduce additional evidence, and neither party requiring a jury, by consent of the parties, this cause was submitted to the Court, in lieu of a jury, and upon said agreed statement of facts, for its consideration and judgment; [22]

And it appearing to the Court that a libel of information in the above-entitled cause was duly filed before this Honorable Court on the 1st day of August, 1921, and that in pursuance thereof there was issued out of this Court on said day an order for

hearing on said libel of information, and that process in due form of law issued against the property described in said libel of information to enforce forfeiture thereof, and that notice of the time and place of said hearing was duly given to all other persons interested in said property by publication of the substance of said libel in due form of law; and

It appearing that said process was duly served and publication made in pursuance of said order; and

It further appearing to the Court that all the allegations contained in the libel of information herein are admitted as true by the said agreed statement of facts on file herein, and the Court being now fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That the property herein described, to wit, one Hudson Automobile, License No. 57695 Montana, 1920, Engine No. 91473, Car No. 32512; and one 34 x 4½ Goodrich Silvertown Cord tire on right front wheel, one 34 x 4½ Goodyear tire on right rear wheel, one 34 x 4½ Goodyear tire on left front wheel, one 34 x 4½ Goodyear tire on left rear wheel, one 34 x 4½ Goodyear tire on side of car, one bumper in front, one short handle shovel, one full set side curtains, one auto jack, one tire pump, one demountable rim wrench, three small monkey-wrenches, three hammers, two pairs pliers, four end wrenches, one storage battery, one spotlight one 34 x 4½ inner tube, one set 34 x 4½ chains, be, and the same are hereby declared to be condemned and forfeited to the United States of America, and

that the same be sold at a public place in the City of Hardin, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, [23] for cash by said United States Marshal for the district of Montana; that the said Marshal shall give fifteen days' notice of such sale by advertising in the "Hardin Tribune," a newspaper of general circulation, printed and published in the City of Hardin, in the State and District of Montana, the same being a newspaper published nearest the said place of sale; and shall within ten days after such sale pay the proceeds thereof to the Clerk of this Court, after deducting all proper charges and costs incurred herein to be allowed by this Court.

Done in open court this 13 day of March, 1922.

BOURQUIN.

Judge.

Filed March 13, 1922. C. R. Garlow, Clerk.

Thereafter, on April 7, 1922, bill of exceptions was duly allowed, signed and filed herein, being in the words and figures following, to wit: [24]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4½
Goodrich Silvertown Cord Tire on Right
Front Wheel, One 34 x 4½ Goodyear Tire

on Right Rear Wheel, One 34 x 4½ Goodyear Tire on Left Front Wheel, One 34 x 4½ Goodyear Tire on Left Rear Wheel, One 34 x 4½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34x4½ Innertube, One Set 34x4½ Chains, and A. J. STUPER,

Libelees,

and

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

Intervenor.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial on the 10th day of March, 1922, without a jury,—a jury having been waived by the written stipulation of the parties filed in said cause,—the Honorable GEORGE M. BOURQUIN, United States District Judge for Montana, presiding.

Whereupon the following proceedings were had and evidence introduced, to wit:

A stipulation was entered into between the parties, which, omitting title of court and cause, is as follows: [25]

“IT IS HEREBY STIPULATED AND AGREED by and between John L. Slattery, Esq., United States District Attorney for the District of Montana, for and on behalf of the United States of America in the above-entitled matter, and Messrs. Grimstad & Brown, for and on behalf of the claim of E. P. McDowell in the above-entitled matter, that the following facts are hereby admitted as true and are hereby submitted to the Court for judgment thereon:

I.

That A. J. Stuper did on the 31st day of January, 1921, near the City of Hardin, County of Big Horn, State and District of Montana, have possession of One Hudson Automobile, License No. 57695 Montana 1920, Engine No. 91473, Car No. 32512, together with the tools and accessories described in the information on file herein, and that at that time the said A. J. Stuper had a quantity of distilled spirits, to wit, whiskey, in said automobile, and that he was transporting, removing, and concerned in removing the same, by means of said Hudson Automobile, tools and accessories, as mentioned in said libel of information, without first obtaining a permit entitling him so to do, and paying the Internal Revenue tax due thereon; the said whiskey then and there so transported and removed being distilled spirits in respect whereof a tax then was imposed by law, to wit, the Internal Revenue tax imposed by law on distilled spirits, and then and there due and unpaid; that said Hudson Automobile and tools and accessories were taken by the plaintiff, by and

through its proper officers, and that they are now in the possession of plaintiff, its officers and agents.

II.

That at the time said automobile, tools and accessories, as mentioned in said libel of information, were taken into the possession of the United States of America that E. P. McDowell, the intervenor herein, had a valid and existing claim against [26] said automobile, tools and accessories in the sum of Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, and that said claim of the said E. P. McDowell was represented by a conditional bill of sale, he having sold automobile, tools and accessories to the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time of the seizure thereof; that said conditional bill of sale was signed and executed by the said A. J. Stuper and was *bona fide* in all respects, and was placed on record in the office of the County Clerk and Recorder of Deeds for Yellowstone County, Montana, on the 7th day of December, 1920, which is the County where said E. P. McDowell is doing business and where said automobile, tools and accessories were sold; that said sale was in all respects fair and legal and was not made with any knowledge or information of any kind whatsoever on the part of said E. P. McDowell that the said A. J. Stuper intended to, or had any intention of any kind to use the same to transport distilled spirits in violation of the law of the United States of America.

III.

That said automobile, tools and accessories were taken from A. J. Stuper, at the time and manner mentioned in said libel of information, by John MacLeod, who was at that time sheriff of Big Horn County, Montana, and that he was not at that time, or at all, an officer of the United States of America, but at said time was acting in his capacity as a sheriff of Big Horn County, Montana.

IV.

That the whiskey so being removed and transported in said Hudson Automobile, at the time said Hudson Automobile, tools and accessories were seized, was Canadian whiskey, then and there and theretofore imported into the United States and [27] upon which the Internal Revenue tax therefor had not been paid.

V.

That after said automobile, tools and accessories were seized by the said sheriff of Big Horn County, Montana, it was at a subsequent date thereof duly turned over to the officers of the United States of America, together with the distilled spirits found in said automobile.

VI.

That the libel information as filed herein is prosecuted by reason of the violation of the Internal Revenue Laws of the United States of America, and not by reason of any violation of the National Prohibition Act, which is commonly known as the Volstead Act.

VII.

That the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time they were seized, has never been convicted of the crime of transporting and removing distilled spirits with intent to defraud the United States of America from any tax imposed by law thereon, or at all.

VIII.

That a true and correct copy of said conditional sales contract is attached to the answer of E. P. McDowell filed in said cause, and that said sum, to wit, Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at ten per cent per annum from December 3, 1920, was due and owing the said E. P. McDowell from the said A. J. Stuper at the time said automobile, tools and accessories were taken from the said A. J. Stuper, as set forth in said libel of information, and that said sum and interest is now due the said E. P. McDowell, and has not been paid, and that the same would be a valid lien against said automobile, tools and accessories, if the same were sought to be forfeited under the laws of the State of Montana, and that the said [28] E. P. McDowell has no other means of collecting or enforcing said claim.

Signed and dated this 3rd day of March, 1922.

JOHN L. SLATTERY,

United States Attorney, District of Montana.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

Attorneys for E. P. McDowell, Intervenor."

That thereafter a motion was made on behalf of E. P. McDowell the intervenor, for a decision in his favor upon the ground that the libel of information was filed because of the violation of the Internal Revenue Law of 1866, and that the same has been repealed by the National Prohibition Act.

Said motion was overruled by the Court and exception noted. The Court thereupon found the issues in favor of the libelant and judgment and decree ordered accordingly.

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct bill of exceptions in said action, and that the recitals therein regarding the evidence are true and correct, and the same is now allowed, approved and signed and ordered filed and made a part of the records in said cause.

Dated this 7 day of April, 1922.

BOURQUIN,
Judge.

Comes now John L. Slattery, Esq., United States District Attorney, and says to the Court that he has no amendments or corrections to propose to the above and foregoing bill of exceptions, and hereby consents that the same may be settled and allowed immediately.

Signed and dated this —— day of March, 1922.

United States District Attorney. [29]

Due service of the within bill of exceptions and receipt of a copy of the same is acknowledged this 18th day of March, 1922.

W. H. MEIGS,
Asst. U. S. Atty.,
Attorney for Pltf.

Filed April 7, 1922. C. R. Garlow, Clerk.

That on March 30, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [30]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4 $\frac{1}{2}$ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Right Rear Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Left Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Left Rear Wheel, One 34 x 4 $\frac{1}{2}$ Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One

Storage Battery, One Spotlight, One 34 x 4½
Innertube, One Set 34 x 4½ Chains, and A.
J. STUPER,

Libelees,

and

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Intervenor.

Assignment of Errors.

The petitioner in error, in connection with his petition for a writ of error, makes the following assignments of errors, which he avers occurred upon the trial of the cause, to wit:

1. The lower court erred in overruling intervenor's motion for judgment and decree in his favor, for the reason that the libel of information failed to state facts sufficient to show that the said automobile, tools and accessories, as alleged in the information, had been used in violation of any laws of the United States of America.

2. The lower court erred in refusing to grant the intervenor's motion for judgment and decree in his favor, for the reason that the libel of information was prosecuted by reason [31] of the violation of the Internal Revenue Laws of the United States of America, and that said law or laws had been and were at the time of the trial of said cause repealed by what is known as the National Prohibition Act, otherwise commonly known as the Volstead Act.

3. The lower court erred in refusing to grant the motion of the intervenor for judgment and decision in his favor, for the reason that he had a valid and existing claim against said automobile, tools and accessories, and that he had no way of obtaining payment of said claim except by taking said automobile, tools and accessories.

4. The lower court erred in refusing to grant intervenor's motion for judgment and decision in his favor and in rendering judgment and decision in favor of the libelant, for the reason that the statute under which the libel proceeded has been repealed, and that the seizure and attempted forfeiture of the said automobile, tools and accessories was void, illegal and of no force and effect.

GRIMSTAD & BROWN,
By O. KING GRIMSTAD,
Attorneys for Intervenor.

Due service of the within Assignment of Errors and receipt of a copy of the same is acknowledged this 30th day of March, 1922.

W. H. MEIGS,
Asst. U. S. Attorney,
Attorney for Pltf.

Filed March 30, 1922. C. R. Garlow, Clerk.

That on March 30, 1922, citation was duly issued and filed herein, the original citation being hereto annexed and being as follows, to wit: [32]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty days from date hereof, to wit, the 30 day of Mar. 1922, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Montana, where E. P. McDowell, doing business under the firm name and style of E. P. McDowell Motor Company, is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Judge of the United States District Court for the District of Montana this 30th day of March, 1922.

BOURQUIN,
Judge. [33]

Due service of the within Citation on Writ of Error and receipt of a copy of same is acknowledged this 30 day of Mch., 1922.

W. H. MEIGS,
Asst. U. S. Atty.,
Attorney for Libelant. [34]

[Endorsed]: No. 938. In the United States Circuit Court of Appeals for the Ninth Circuit. E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error, vs. United States of America, Defendant in Error, Citation on Writ of Error. Filed this 30th day of Mar., 1922. C. R. Garlow, Clerk of the District Court. By —————, Deputy.

Thereafter, to wit, on March 30, 1922, writ of error was duly issued herein, the original writ of error being hereto annexed and being as follows, to wit: [35]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States of America to
the Honorable Judge of the District Court of
the United States for the District of Montana:

Because in the record and of proceedings, as also
in the rendition of judgment between the United
States of America, as libellant, and E. P. McDowell,
doing business under the firm name and style of E.
P. McDowell Motor Company, as intervenor, a
manifest error hath happened to the great damage
of said intervenor, as by his complaint appears, and
we being willing that error, if any hath been done,
should be corrected, and full and speedy justice
done to the party aforesaid in this behalf do com-
mand you, if judgment be therein given, that under
your seal you send the record and proceedings
aforesaid, with all things concerning the same, to
the United States Circuit Court of Appeals for the
Ninth Circuit, together with this Writ, so that you

have the same at the City of San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in said Circuit Court of Appeals to [36] be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 30th day of March, 1922.

[Seal] C. R. GARLOW,
Clerk of the United States District Court for the
District of Montana.

Allowed this 30th day of March, 1922, after plaintiff in error had filed with this court with his petition for a writ of error, his assignment of errors.

BOURQUIN,
Judge. [37]

Due service of the within Writ of Error, and receipt of a copy of same is acknowledged this 30th day of March, 1922.

W. H. MEIGS,
Asst. U. S. Atty.,
Attorney for Libelant. [38]

[Endorsed]: No. 938. In the United States Circuit Court of Appeals for the Ninth Circuit. E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error, vs. United States of America,

Defendant in Error. Writ of Error. Filed this 30 day of March, 1922. C. R. Garlow, Clerk of District Court. By _____, Deputy.

That on March 30th, 1922, stipulation as to record, was duly filed herein, being as follows, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Stipulation as to Record.

IT IS HEREBY STIPULATED by and between counsel for the respective parties that the parts of the record necessary for consideration of the errors assigned and intended to be relied upon are as follows:

Libel of information and order; motion for leave to intervene and intervenor's petition; stipulation waiving trial by jury; decree; bill of exceptions; assignments of error; writ of error.

Dated this 30th day of March, 1922.

GRIMSTAD & BROWN,
By O. KING GRIMSTAD,
Attorneys for Plaintiffs in Error.

W. H. MEIGS,
Attorney for Defendant in Error.

Filed March 30, 1922. C. R. Garlow, Clerk.

That on March 30, 1922, a praecipe for record was duly filed herein in the words and figures following, to wit: [39]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 41½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 41½ Goodyear Tire on Right Rear Wheel, One 34 x 41½ Goodyear Tire on Left Front Wheel, One 34 x 41½ Goodyear Tire on Left Rear Wheel, One 34 x 41½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One

Storage Battery, One Spotlight, One 34 x 41½
Innertube, One Set 34 x 41½ Chains, and A. J.
STUPER,

Libelees,

and

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Intervenor.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them, under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause:

Libel of information and order; motion for leave to intervene and intervenor's petition; stipulation waiving jury; assignments of errors; writ of error; bill of exceptions; judgment and decree; praecipe for appellate record; clerk's certificate, and stipuation on printing of record.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

Attorneys for Plaintiff in Error.

Filed March 30, 1922. C. R. Garlow, Clerk.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 40 pages, numbered consecutively from 1 to 40 inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed (except stipulation waiving jury trial, as no such stipulation was filed in said cause), as appears from the original records and files of said court in my custody as such clerk.

And I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifteen and 80/100 Dollars (\$15.80), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 21st day of April, A. D. 1922.

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk. [41]

[Endorsed]: No. 3865. United States Circuit Court of Appeals for the Ninth Circuit. E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed April 24, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

